FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION, and HARBOR LEASING, LLC, an ALASKA LIMITED LIABILITY COMPANY

v.

THE CITY OF HOMER, a MUNICIPAL CORPORATION, and its PORT OF HOMER

COMPLAINANTS' PREHEARING REPLY BRIEF

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Introduction

Respondents' refusal to address or even to acknowledge the personal jurisdictional issue under review is an additional admission and repeated ratification of their waiver of objection to the Commission maintaining personal jurisdiction over Respondents. The Commission is empowered and directed by Congress to exercise subject matter jurisdiction over the violations developed in Complainants' Fourth Amended Complaint and admitted by operation of law in Respondents' Fourth Amended Answer. In addition, because Respondents fail to challenge or even to acknowledge the evidentiary objections intertwined with the jurisdictional issues discussed by Complainants, the evidentiary objections should be deemed to be well-taken and resolved before the Initial Decision is vacated and remanded.

The Commission Properly Maintains Personal Jurisdiction Over Respondents

Federal Rule of Civil Procedure 12 addresses: "Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; **Waiving Defenses**; Pretrial Hearing." (Emphasis added).[1] Civil Rule 12(b)(1) and (2) state:

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[1] Commission Rule § 502.12 "Applicability of Federal Rules of Civil Procedure" states: "In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative practice." In Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, 28 SRR 1436, 1453 (ALJ 2000), Judge Dolan notes:

> Pursuant to Rule 12 of the Rules of Practice and Procedure, the Commission follows the Federal Rules of Civil Procedure when there is no specific Commission rule, to the extent that the federal rules are consistent with sound administrative practice and procedure, 46 CFR §502.12; Miscellaneous Amendments to Rules of Practice and Procedure, 26 SRR 902, 904 (1993); McKenna Trucking Co. Inc v. A.P. Moller-

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (1) lack of subject-matter jurisdiction;
>
> (2) lack of personal jurisdiction;

(Emphasis added). Civil Rule 12(g) states:

> (g) Joining Motions.
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> (1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.
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> (2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(Emphasis added). Respondents previously filed multiple motions including a motion for summary judgment regarding the statute of limitations and a motion to compel, yet they never filed a separate motion challenging personal jurisdiction or joined it with another motion. Civil Rule 12(h)(1) states:

> (h) **Waiving** and Preserving Certain Defenses.
>
> (1) *When Some Are Waived.* A party **waives** any defense listed in Rule 12(b)(2)–(5) by:
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> (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
>
> (B) failing to either:

> Maersk, 27 SRR 1045, 1051 (ALJ, Administratively Final: June 23, 1997). Under the Federal Rules, motions to dismiss are governed by Rule 12(b) and its standards. The federal rules forming the basis of respondents' motions are Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(2) (lack of personal jurisdiction).

(Emphasis added).

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(Emphasis added). Respondents have filed multiple responsive pleadings – four answers and two motions – and have failed to file a motion regarding personal jurisdiction under this rule and thus have waived any challenge to personal jurisdiction.

In Ruhrgas AG v. Marathon Oil Co., et al., 526 U.S. 574, 583 – 84 (1999), a unanimous Supreme Court states and holds:

> The Court of Appeals accorded priority to the requirement of subject-matter jurisdiction because it is nonwaivable and delimits federal-court power, while restrictions on a court's jurisdiction over the person are waivable and protect individual rights. See id., at 217-218. **The character of the two jurisdictional bedrocks unquestionably differs**. Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level. See Steel Co., 523 U.S., at 94-95, 118 S.Ct. 1003; Fed. Rule Civ. Proc. 12(h)(3) ("Whenever it appears ... that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); 28 U.S.C. § 1447(c) (1994 ed., Supp. III) ("If at any time before final judgment [in a removed case] it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").
>
> Personal jurisdiction, on the other hand, "represents a restriction on judicial power ... as a matter of individual liberty." Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). **Therefore, a party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority**. See **Fed. Rule Civ. Proc. 12(h)(1)** (defense of lack of jurisdiction over the person waivable); Insurance Corp. of Ireland, Insurance Corp. of Ireland, 456 U.S., at 703, 102 S.Ct. 2099 (same).

(Emphasis added). To paraphrase the Supreme Court, Respondents did not insist that the limitation be observed and did forgo that right and effectively consented to the Commission's exercise of statutory authority under the shipping statutes.

In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982), the Supreme Court states and holds:

> The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. Stoll v. Gottlieb, 305 U.S. 165, 171–172, 59 S.Ct. 134, 137–138, 83 L.Ed. 104 (1938); Thompson v. Whitman, 18 Wall. 457, 465, 21 L.Ed. 897 (1874). The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements. **Petitioners fail to recognize the distinction between the two concepts—speaking instead in general terms of "jurisdiction"—although their argument's strength comes from conceiving of jurisdiction only as subject-matter jurisdiction**.

(Emphasis added). Respondents refuse to accept the distinction between the concepts of personal jurisdiction and of subject matter jurisdiction. The Court concludes:

> Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. In McDonald v. Mabee, supra, the Court indicated that regardless of the power of the State to serve process, an individual may submit to the jurisdiction of the court by appearance. A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court. In National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316, 84 S.Ct. 411, 414, 11 L.Ed.2d 354 (1964), we stated that "parties to a contract may agree in advance to submit to the jurisdiction of a given court," and in Petrowski v. Hawkeye-Security Co., 350 U.S. 495, 76 S.Ct. 490, 100 L.Ed. 639 (1956), the Court upheld the personal jurisdiction of a District Court on the basis of a stipulation entered into by the defendant. In addition, lower federal courts have found such consent implicit in agreements to arbitrate. See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (CA2 1964); 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 4.02[3], n. 22

(1982) and cases listed there. Furthermore, the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures. See Adam v. Saenger, 303 U.S. 59, 67–68, 58 S.Ct. 454, 458, 82 L.Ed. 649 (1938) ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts ... It is the price which the state may exact as the condition of opening its courts to the plaintiff"); Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29–30, 37 S.Ct. 492, 493, 61 L.Ed. 966 (1917) ("[W]hat acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ"). **Finally,** unlike subject-matter jurisdiction, which even an appellate court may review *sua sponte*, under Rule 12(h), Federal Rules of Civil Procedure, **"[a] defense of lack of jurisdiction over the person ... is waived" if not timely raised in the answer or a responsive pleading**.

In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant **may be estopped** from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—*i.e.*, certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.

The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights. **Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection**.

Id. at 703 – 05 (Emphasis added).

Respondents filed an unconditional appearance. Respondents admitted personal jurisdiction by operation of law as discussed below. CX 282; no specific objection. Respondents did not deny the Commission's personal jurisdiction.

Respondents did not assert an affirmative defense challenging personal jurisdiction. CX 283; no affirmative defense. Respondents' prior filing of the Tariffs with the Commission is an agreement in advance to submit to the personal jurisdiction of the Commission.[2] Respondents constructively consented to the personal jurisdiction of the Commission by voluntarily using multiple Commission procedures over the past two years before this Commission. Of pivotal concern, Respondents never filed a motion to challenge personal jurisdiction pursuant to Civil Rule 12(b)(2). Because of Respondents' actions and inaction, Respondents should be estopped to challenge personal jurisdiction. Respondents' failure to enter a timely objection to personal jurisdiction constitutes, under Civil Rule 12(h)(1), a waiver of the objection. In Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, 28 SRR 1436, 1443 at n. 13 (ALJ 2000), Judge Dolan notes: "RDA has the burden of proof, under Christy v. Pennsylvania Turnpike Comm'n, 54 F3d 1140, 1144 (3d Cir), cert. denied, 516 US 932 (1995), to establish its affirmative defense." Respondents have failed to assert an affirmative defense and perforce have not met their burden of proof to establish the affirmative defense.

To date, Respondents have not even challenged the Commission's personal jurisdiction over them. Because the Commission has not been asked to question its personal jurisdiction over Respondents, the number of common carriers calling at the Port or precluded from calling at the Port by the Port is not before the Commission. However, settled law requires only that common carriers call at a marine terminal operator's facilities or use its terminal services. In River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28 SRR 751, 764 (FMC 1999), the Commission holds:

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[2] By contrast, parties cannot consent to subject matter jurisdiction, although they can admit the facts that give rise to subject matter jurisdiction.

> Furthermore, in the instant case, the evidence shows that Ormet has served many common carriers. I.D. at 14-27. Therefore, it is unnecessary to address either Ormet's [Respondent's] or RIVCO's [Complainant's] arguments relating to the number of common carriers served at a terminal.

(Emphasis added). In a recent case, R.O. White & Co. and Ceres Marine v. Port of Miami Terminal Operating Co., 31 SRR 783, 797 (ALJ 2009), Judge Lang notes:

> **BOE emphasizes that the Commission has never determined jurisdiction on a port-by-port basis, nor does the Act establish a geographical requirement for jurisdiction** other than that terminal operations must be carried on within the United States.

(Emphasis added).[3] Judge Lang finds and concludes:

> Ports America Florida admits that it provides MTO services in Tampa, but maintains that it does not do so in Miami. Ports America admits that it is a MTO in several ports in the United States, but denies that it is a MTO in Miami . . . . **They have cited no authority in support of the proposition that the personal jurisdiction of the Commission is to be determined separately at each port**.

Id. at 807 (Emphasis added). Respondents have cited no authority in support of the proposition that the personal jurisdiction of the Commission over Respondents, if the matter were timely before the Commission, is to be determined separately at each port.

In Petchem, Inc. v. Canaveral Port Authority, 23 SRR 974, 983 (FMC 1986), aff'd sub nom, Petchem, Inc. v. Federal Maritime Commission, 853 F.2d 958, 24 SRR 1156 (D.C. Cir. 1988), the Commission concludes:

> Thus, Continental Grain does not establish that "holding out" by itself creates Commission jurisdiction over a terminal facility. If jurisdiction were to be found here over Port Canaveral on the basis of its tariff publication and solicitation of common carriers, an explicit extension of existing precedent would be required. Because we find below that the passenger operations at the Port are common carriage for Shipping Act purposes, it is unnecessary to establish any new standard of law with respect to "holding out" in this case. [Footnote]

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[3] The Commission could request the Bureau of Enforcement (BOE) to confirm that the Commission has never determined jurisdiction on a port-by-port basis.

The footnote states:

> Respondents perceive a difference between the 1984 Act's definition of a regulated carrier, which expressly includes "holding out," and the Act's definition of a regulated port, which refers to the "furnishing" of terminal facilities. 46 USC app. ¶1792(6), (15). Respondents would require actual, contemporaneous "furnishing" in order for Commission jurisdiction to attach. Petchem counters that Respondents' reasoning would cause Commission jurisdiction to "wink on and off," depending on the presence of cargo carriers. Oral Argument Tr. at 47.

(Emphasis added). The Circuit Court states and finds:

> Although several jurisdictional issues were raised before the FMC and decided in its opinion, **the Commission explicitly left open an alternative ground for finding in personam jurisdiction based on the CPA's filed tariffs for cargo shipping**. FMC Op., 23 Shipping Reg. (P & F) at 981 – 83.

853 F.2d at 961 (Emphasis added). The Commission properly may cite this alternative ground for reaffirming personal jurisdiction based on the Respondents' filed tariffs regulating and assessing fees for cargo shipping and handling at all the marine terminals.[4] The Shipping Act does not allow a marine terminal operator to "doff and don" the marine terminal operator's hat on a whim or to reject the clear written geographic scope of the Tariffs and the actual practice and representations of Respondents to Complainants and other persons.

The Commission Has Subject Matter Jurisdiction Of The Shipping Act Violations

Respondents have discounted the Tariffs as just a publication. Respondents' multiple breaches of their duties under the Tariffs and continuing violations of the

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[4] See generally Dart Containerline Co., Ltd. v. Federal Maritime Commission, 722 F.2d 750, 753 (D.C. Cir. 1983) (The court estopped a party who sought to "blow hot and cold and take a position contrary to that taken in the proceedings.") Respondents through the City Council have not properly undertaken the required formal process to amend the written Tariffs and file them with the Commission.

shipping statutes spring in substantial part from a fundamental unwillingness of Respondents to acknowledge and honor their duties and responsibilities under the Tariffs and the shipping statutes. Title 46 CFR § 525.2(a) and (a)(2) state:

> (a) *Marine terminal operator schedules.* A marine terminal operator, at its discretion, may make available to the public, subject to section 10(d) of the Act (46 U.S.C. 41102(c), 41103, 41106), a schedule of its rates, regulations, and practices.
>
> . . .
>
> (2) *Enforcement of terminal schedules.* Any schedule that is made available to the public by the marine terminal operator **shall** be enforceable by an appropriate court as an **implied contract** between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule.

(Emphasis added).[5] This Commission has "a proper role" in addressing these breaches of the Tariffs and violations of the shipping statutes.[6] After and only after notice and an

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[5] "Shall" means "shall" and is the language of command. In Service Employees Intern. Union v. U.S., 598 F.3d 1110, 1113 (9th Cir. 2010), the Ninth Circuit, relying on United States Supreme Court decisions, states: "'There shall be paid $X' is language commanding a statutorily required amount. This language does not confer on the agency discretion to decide how much ought to be paid. "The word 'shall' is ordinarily 'The language of command.'" (citing Anderson v. Yungkau, 329 U.S. 482, 485 . . . (1947) (quoting Escoe v. Zerbst, 295 U.S. 490, 493 . . . (1935)); see also Lopez v. Davis, 531 U.S. 230, 241 . . . (2001) ("Congress used 'shall' to impose discretionless obligations"); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 . . . (1998) ("[T]he mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion.").)

[6] In Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, 28 SRR at 1449, Judge Dolan notes:

> [T]he Supreme Court has upheld the Commission's proper role in asserting jurisdiction in a case such as this:
>
> > The Commission simply cannot defer to the courts matters which are so intricately involved with its responsibilities under the shipping statutes.

opportunity to be heard, official written Homer City Council action on the record, and published revised Tariffs filed with the Commission may the Tariffs properly and validly be amended.[7] The written Tariffs govern the business dealings and leasing activities of the Respondents with Complainants, with Icicle Seafoods and with other persons including common carriers. Further review of Respondents' application and interpretation of those Tariffs and the shipping statutes is properly before this Commission.

The parties agree that Complainants are involved in "receiving, handling, storing or delivering" cargo and thus are a "shipper." Title 46 U.S.C. § 40102(22) defines "Shipper" as: "The term 'shipper' means (A) a cargo owner." In Petchem, 23 SRR at 986, the Commission states:

> Respondents' analysis is incorrect. The essential facts of Bethlehem Steel should be distinguished from those of St. Philip and this case. The effect of a harbor construction fee on a ship's access to terminal facilities is far more remote and tangential than that of tug

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> Pacific Maritime Assn – Cooperative Working Arrangements, 14 SRR 1447, 1451 (FMC 1975), aff'd. Federal Maritime Commission v. Pacific Maritime Assn, 435 US 40 [15 SRR 353] (1978).

[7] In Prudential Lines, Inc. v. Continental Grain Co., 21 SRR 133, 161 (ALJ 1981), aff'd, 21 SRR 1172 (FMC 1982), Judge Kline finds and holds:

> In the present case, therefore, having chosen not to exclude common carriers from its N&W Elevator by tariff or otherwise, Continental has gained the benefits of serving common carriers as well as contract carriers. **It cannot, therefore, renounce its status as a public terminal operator unless and until it specifically discontinues service to common carriers in its tariff and adheres to such publication.**

(Emphasis added). The legal process to amend the Tariffs "to discontinue service to common carriers" and others and to narrow the geographic reach of the Tariffs is discussed by Mr. Hogan who served on the Homer City Council. Mr. Hogan's many years of service to the City of Homer including serving as a member of the Homer City Council are established in three stipulated findings. ID at 9, Findings 31 - 33.

service. Moreover, two decisions more recent than Bethlehem Steel indicate that the theory articulated in St. Philip has continuing vitality. In Louis Dreyfus Corp v. Plaquemines Port, Harbor and Terminal District, ___ FMC ___ [25 FMC 203], 21 SRR 1072 (1982), the Commission stated:

> "**The statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation.**" Id. at 1079.

(Emphasis added). The statutory scheme contemplates regulation of Respondents because they exercise sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers such as Complainants and on common carriers contracting with Complainants involved in that link in transportation.

In Carolina Marine Handling, Inc., 28 SRR at 1456 – 58, Judge Dolan discusses and distinguishes the tests for personal jurisdiction and subject matter jurisdiction and analyses and contrasts Plaquemines and Ponce:

> . . . . RDA exercises **complete control** over the occupancy and use of all marine terminal facilities at the Navel Complex. (Stender affidavit.) RDA does this through its determination over who should be granted a lease, license, and rights to terminals, piers, wharves, storage facilities and back-up areas throughout the Naval Complex. (Stender affidavit at ¶66.)
>
> . . . . Clearly, RDA **has the ability to unlawfully discriminate among prospective tenants** as shown in the affidavits to Stender and Sprott.
>
> As seen in Plaquemines, the Commission and the D.C. Circuit Court of Appeals were confronted with a port authority that neither owned nor operated the private marine terminal facilities over which it sought to exercise regulatory control. The fact that the port provided a service to the private terminals was insufficient, alone, to attach Commission jurisdiction: "Thus the critical issue for jurisdiction is that the degree of the Port's involvement enable the Port to discriminate." 838 F2d at 245.

The key term enunciated by the court was "**involvement.**" The court found that the port's **involvement** arose from its assessment of the fee in a discriminatory manner that resulted in the port's exercise of control over access to the terminal facilities. The implement of "**involvement**" was the fee that the port used in a discriminatory manner to control access to marine terminal facilities and **from which the Commission jurisdiction was derived**.

In the instant proceeding, the implement of "**involvement**" is RDA's leasing power. RDA uses such power in a manner that the results are controlling access to public marine terminal facilities. RDA's leasing practices combined with RDA's control of access to the Naval complex terminal facilities meet the criteria established by the court and constitutes the furnishing of wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, and therefore subjects RDA to Commission personal jurisdiction as a marine terminal operator within the meaning of section 3(15) of the 1984 Act, 46 USC §1702(15).

It is evident that **it is RDA's ability to discriminate through the extent of its involvement in the provision of terminal facilities that is sufficient to sustain Commission bedrock jurisdiction**, for one of the main purposes of the 1984 Act is "to establish a nondiscriminatory regulatory process." 46 USC §1701. . . . .

RDA mistakenly relied on former Commissioner Moakley's dissent in the Commission decision in Plaquemines, 25 FMC 73, and reached an erroneous conclusion. Commissioner Moakley expressed concern over the extent of Commission jurisdictional reach, commenting solely on the particular factual scenario presented to the Commission in Plaquemines. His dissent in no way discredits the "**controlling of access**" to marine terminals as a basis for implicating Commission jurisdiction. Serving as the Fact Finding Officer in FMC Fact Finding Investigation No. 17, Commission[er] Moakley thereafter issued his Report, Fact Finding Investigation No. 17 Rates, Charges and Services Provided at Marine Terminal Facilities, 24 SRR 1260 (issued August 31, 1998), declaring "**the control of access**" jurisdictional link to represent the essence of economic control by a terminal operator and to be subject to the greatest potential for abuse.

> The ability to control access to terminal facilities is the economic power subject to the greatest potential for abuse, as the railroads demonstrated early in this century. **Regulatory oversight which ensures reasonable, non-discriminatory access to those facilities should be the primary focus of the Commissions' regulation of marine terminal activities**.

24 SRR 1260, 1280.

RDA also asserts that it must "furnish" services in order to implicate Commission jurisdiction. That is not the holding of Plaquemines as may be seen in the earlier quote from that case or the criterion used by the court to reach the conclusion that the port had subjected itself to Commission jurisdiction. Moreover, in Fact Finding Investigation No. 17, Commissioner Moakley reinforced the Commission's definitional stance:

> Most terminal facilities are constructed and improved by public ports who "furnish" such terminal facilities to terminal operators or ocean common carriers through leases or other negotiated arrangements. In a very real sense, these public authorities control use of and access to those facilities through the lease terms and charges and, very often, through **required adherence to the port's tariff**.

24 SRR 1260, 1281.

It is clear that RDA's control over the provision of marine terminal facilities implemented through its leasing power leads to the conclusion that RDA is "furnishing" marine terminal facilities, subjecting itself to Commission personal and subject matter jurisdiction.

As noted earlier, in Puerto Rico Authority v. Federal Maritime Commission, 919 F2d 799 (1st Dir. 1990) ("Ponce") the First Circuit found a port service charge assessed by the Puerto Rico Ports Authority against vessels in the Puerto Rican navigable waters not to be subject to Commission jurisdiction with respect to the port's assessment of such charges at the Port of Ponce. **The First Circuit reached this conclusion on the basis on unusual facts**. The Port of Ponce was an agency of the municipality of Ponce and operated its own terminal facilities under a franchise from the Commonwealth government; and the Port of Ponce exercised exclusive "control and administration" over its own terminal facilities, independent of the Puerto Rico Ports Authority. The Puerto Rico Ports Authority was statutorily excluded from such authority and function at Ponce. 919 F2d 799, 804 and 806.

The First Circuit concluded that the Commission had no jurisdiction because the **Puerto Rico Ports Authority exercised no control or administration over terminal facilities** exclusively within the Ponce municipal jurisdiction, and particularly where **the Ports Authority did not own, operate or lease those facilities**. The First Circuit also found that

> the Ports Authority's charges were related to **navigation** and not directly related to **terminal** practices. Id. at 805-805.
>
> However, in the instant proceeding, the Commission is confronted with an entirely different factual scenario. RDA exercises direct authority and control over the Charleston Naval Complex and its terminal facilities; and its unilateral ability to offer leases and licenses, to enter into leases and licenses, and to refuse to enter into leases and licenses is directly related to, affects and comprises essential terminal services. Whereas in Ponce the fees at issue were determined not to constitute a terminal function, the object of Commission scrutiny in the instant docket are marine terminal leases and licenses whose very terms and conditions are related directly to the "receiving, handling, storing or delivering of property." See Ponce at 805. As a result, RDA's terminal leasing practices in connection with the furnishing of marine terminal facilities brings RDA squarely under Commission jurisdiction.

(Emphasis added). Respondents have the absolute ability to unlawfully discriminate among prospective tenants as detailed in the affidavits of Mr. Hogan and Ms. Yeoman. Respondents "involvement" is more complete and comprehensive than in all the other seminal cases finding that the Commission has subject matter jurisdiction. Respondents' ability to discriminate through the extent of their involvement in the provision of terminal facilities is sufficient to sustain Commission "bedrock jurisdiction."

In Fact Finding Investigation No. 24 – Exclusive Tug Arrangements in Florida Ports, 29 SRR 229, 230 - 231 (FMC 2001), the Commission states:

> On at least two prior occasions, the Commission has determined that the prohibitions, or their statutory predecessors, sections 16 and 17 of the Shipping Act, 1916 ("1919 Act"), 46 USC App. 815 and 816, apply to an MTO's actions in connection with exclusive tug arrangements. In Petchem, Inc. v. Canaveral Port Authority, 23 SRR 974, 987 (1986), aff'd sub nom, Petchem, Inc. v. FMC et al., 853 F2d 958 ([D.C. Cir.] 1988), the Commission found that the Canaveral Port Authority met the definition of MTO and that the Port's practices with respect to tug franchise had "an underlying purpose relating to terminal operations and a more than incidental relationship to the receiving and handling of property and cargo." The Commission found that the exclusive franchise in question in that proceeding was prima facie unreasonable and placed the burden upon respondents to justify the arrangements.

> Earlier, in A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co. and Seaboard Coast Line R.R. Co., 11 SRR 309 (1969), the Commission determined that respondents MTOs had subjected themselves to jurisdiction under the 1916 Act by entering into and implementing provisions of an exclusive contract for tug services at a phosphate elevator. There, the Commission found that the practice was unjust and unreasonable under sections 16 and 17 of the 1916 Act.

(Emphasis added; footnote omitted).

In Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 335 F. Supp.2d 275 (D. Conn. 2004), the district court judge confuses and merges personal and subject matter jurisdiction before making a cursory and conclusory statement:

> Since the Port Authority exercises little control over the operations of the private marine cargo terminals at the Bridgeport Harbor, and since its control over the Ferry Company does not impact those private facilities, it does not implicate the concerns behind the Shipping Act or make the Authority a "Marine Terminal Operator" under the Shipping Act.

(Emphasis added). Although the motion before the court is not noted, the judge states that the Shipping Act did not provide him with personal jurisdiction over the Port. Although the causes of action under the Shipping Act were not even noted, he held that the Commission would not have had jurisdiction. The case is inapposite.

Respondents Admit The Commission's Personal Jurisdiction Over Them (And The Facts Supporting Subject Matter Jurisdiction[8], The Statutory Violations And Damages) By Operation Of Law And Responds With Inadmissible Evidence

[8] In R.O. White & Co. and Ceres Marine v. Port of Miami Terminal Operating Co, 31 SRR 783, 808 (ALJ 2009), Judge Lang notes:

> In reaching this conclusion, I am mindful that the parties may not confer [subject matter] jurisdiction on the Commission by their own statements, Plaquemines. They may, however, by their **actions and admissions**, provide evidence by which jurisdictional findings can be made, Dart Containerline Co. v. Federal Maritime Com'n, 722 F2d 750, 752 [22 SRR 547] (DC Cir 1983). There is such evidence in this case.

(Emphasis added). There is overwhelming evidence in this case.

Complainants' evidentiary points on appeal are inextricably intertwined with the jurisdictional issues before the Commission and ask two fundamental and intertwined questions: "1) Which Commission Rules apply and which Commission Rules do not apply? and 2) How does a person determine which Commission Rules apply and which Commission Rules do not apply?" Complainants followed all the Commission Rules.

From the outset, as clearly required by the Rule, Complainants specifically contended in every one of their verified Complaints: "The City and Port are subject to the provisions and protections of the Shipping Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority."[9] CX 273, lines 7 - 10. Despite being clearly required by the Rule, Respondents never specifically objected to this contention and thus admitted the contention by operation of law. CX 282, lines 8 - 9. As clearly required by the Rule, Complainants specifically contended: "The Federal Maritime Commission has subject matter jurisdiction of this matter and personal jurisdiction of the Respondents. 46 U.S.C. § 40301 and other authority." CX 273, lines 17 - 19. Despite being clearly required by the Rule, Respondents never specifically objected to this contention and thus admitted the contention by operation of law. CX 282, lines 12 - 13. The Point on

[9] In International Shipping Agency, Inc. v. The Puerto Rico Ports Authority, 30 SRR 407, 433 (ALJ 2004), Judge Trudelle finds: "The Complaint before the Commission is very thorough and complies with Commission pleading requirements. It clearly articulates which provisions of the Shipping Act have been violated and is not confusing or unintelligible. Each of these claims then includes reference to the relevant stated facts in support of the claim." (citing Commission Rule § 502.62). Complainants' verified Complaints each were carefully crafted to comply with the Commission Rules and pleading requirements and refer to the relevant stated facts in support of the claims.

Appeal is discussed in Complainants' Exceptions Brief dated June 21, 2013 ("Exceptions Brief") at pages 39 – 44 as follows:

> **2. A. The ALJ erred in not finding that Respondents admitted the specific contentions set forth in Complainants' Verified Complaints pursuant to the clear language in Commission Rules §§ 502.62(a), 502.64(a), 502.70(c) and 502.207(b) and thus Complainants' Proposed Findings of Fact 1 – 109 should be admitted as a matter of law.**

Complainants note that the Tariffs clearly apply to the Fish Dock and all the other terminal facilities and terminal services owned and operated by Respondents. Respondents always regularly stated and represented to Complainants that the Tariffs apply to the Fish Dock and all the other Port terminal facilities and terminal services of Respondents. To circumvent application of the Tariffs and to contradict the clear express terms of letters, leases, contracts and e-mail correspondence, Respondents submitted many late-filed affidavits despite two orders from the ALJ requiring the parties to adhere strictly to the provisions set forth in the Scheduling Order.[10] The Point on Appeal is discussed in the Exceptions Brief at pages 44 – 48 as follows:

> **2. B. The ALJ erred in not striking the untimely testimony presented by the Respondents from individuals who were not timely disclosed in any disclosures, namely the testimony of Mr. Wrede, Mr. Hawkins, Mr. Woodruff and Mr. Sharp.**

The affidavits include statements that are "self-serving litigation-related parol evidence" that should be stricken and disregarded and do not and should not vary the

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[10] The ALJ reminded the parties to comply with the procedure and deadlines in the Scheduling Order dated May 31, 2012 at Pleading Number 11 at page 2. "The parties are reminded that a 'scheduling order "is not a frivolous piece of paper, idly entered which can be cavalierly disregarded by counsel without peril."'" (Citations omitted). In addition, the ALJ reminded the parties to comply with the procedure and deadlines in the Order dated August 9, 2012 at Pleading Number 18. The Court notes at page 2 at paragraph 3 in its concluding paragraph in pertinent part: "The parties were previously advised that '[p]arties cannot control an agency's docket or procedures through agreement among themselves.'" (Citation omitted).

clear "rates, regulations, and practices" and the terms, conditions and provisions in the Tariffs and other written documents.[11] Respondents seek to introduce this parol evidence in affidavits that contradicts prior statements and actions and contemporaneous and clear written documents.[12] Extrinsic evidence of Respondents' and of Icicle Seafoods' subjective intent, expressed during the course of litigation, does not repudiate the clear written provisions. Clear agreements should not be amended, supplemented or repudiated by self-serving litigation-related parol evidence.[13] The Point on Appeal is discussed in the Exceptions Brief at pages 48 – 50 as follows:

> **2. C. The ALJ erred in not striking self-serving litigation-related expressions of prior subjective intent or understanding and parol evidence by certain witnesses as not "relevant, material, reliable and**

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[11] Complainants' concerns with these untimely allegations are grounded in fundamental due process considerations and "fundamental fairness" which derive from the Due Process Clauses of the United States Constitution. Discovery closed on October 8, 2012. Complainants were obligated to and did make their case on December 4, 2012 based on witnesses disclosed in their Disclosures and made available for timely deposition by Respondents. As developed in the Exceptions Brief, most of the affidavits submitted by Respondents were from individuals not previously identified and/or were first offered after Complainants' Brief was filed and/or attempt to vary clear written provisions in the Tariffs, leases and other written documents.

[12] Mr. Wrede and Mr. Hawkins in particular attempt to amend, supplement and/or repudiate earlier statements and advance an interpretation of activities at the Port inconsistent with the written provisions in the Tariffs. As developed in the Exceptions Brief, their testimony should be stricken and disregarded by the Commission. For instance, the ID found: "57. While the City chooses to apply the tariff to the Fish Dock, it does so to ensure transparent and uniform governance of all City facilities and never intended to subject itself to the Shipping Act for conduct on that dock. RX 1243." (Emphasis added). This parol evidence by Mr. Wrede was offered in an untimely affidavit signed on January 3, 2013, almost three months after discovery closed. This testimony conflicts with the clear written definitions and provisions in the written Tariffs. In addition, the ID includes none of the testimony offered by Mr. Hogan or by Ms. Yeoman that discuss the representations and statements made by Mr. Wrede to them regarding the application of the Tariffs to the Fish Dock.

[13] The affidavit of Mr. Bryan Hawkins dated January 3, 2013 marked as Exhibit A to Respondents Brief is one of the many untimely affidavits filed by Respondents that is now challenged before this Commission and should be stricken.

probative" as required by Commission Rule § 502.156 because such statements are not considered probative of parties' reasonable expectations at the time when the Respondents entered into the written agreements.

Resolving these evidentiary matters on appeal is central to the resolution of this matter.

Conclusion – The Commission Maintains Personal Jurisdiction Over Respondents And Subject Matter Jurisdiction Of The Violations Of The Shipping Act Advanced By Complainants And Admitted By Respondents

The Commission's decision 1) to schedule (and kindly reschedule) oral argument and 2) to require a brief essentially requesting the parties to address the jurisdictional issues in 30 (kindly extended to 40) pages was prescient and prudent. The undersigned sought and moved for oral argument at the time the Exceptions Brief was filed in June, 2013 because the jurisdictional discussion in the ID inexplicably merged personal jurisdiction and subject matter jurisdiction. Revisiting the jurisdictional issues in Complainants' Prehearing Brief and this Reply Brief aids in focusing on the specific issues now before the Commission. Assembling the Commissioners and the parties together in one room to explicate this matter remains a promising opportunity.

In Insurance Corp. of Ireland, 456 U.S. at 701, the Supreme Court states: "Petitioners [Respondents] fail to recognize the distinction between the two concepts—speaking instead in general terms of 'jurisdiction'—although their argument's strength comes from conceiving of jurisdiction only as subject-matter jurisdiction." Respondents' refusal to discuss this fundamental distinction in their Brief does not assist resolution of the issues before the Commission. Respondents never filed a motion to challenge personal jurisdiction pursuant to Civil Rule 12(b)(2); their failure to enter a timely objection to personal jurisdiction constitutes, under Civil Rule 12(h)(1), a waiver of the objection to the Commission's exercise of personal jurisdiction over Respondents.

For the reasons stated above, the Commission clearly maintains personal jurisdiction over Respondents and subject matter jurisdiction of the contentions developed in Complainants' Fourth Amended Complaint. Complainants' evidentiary points on appeal are inextricably intertwined with the jurisdictional issues before the Commission and ask, at core, a fundamental and threshold question: "Which Commission Rules apply?"

The Commission could issue a simple decision as follows:

> Respondents failed to assert an affirmative defense challenging personal jurisdiction and never filed a motion to challenge personal jurisdiction and therefore waived any challenge to personal jurisdiction. CX 283; Civil Rules 12(b)(2) and Rule 12(h)(1) adopted by Commission Rule § 502.12. The Commission maintains personal jurisdiction over Respondents and subject matter jurisdiction of the contentions under the Shipping Act developed in Complainants' verified Fourth Amended Complaint. CX 272 – 279; Commission Rule § 502.62(a). Complainants Proposed Findings Of Fact 1 – 109 are admitted by operation of law. Commission Rules §§ 502.62(a), 502.64(a), 502.70(c) and 502.207(b). The testimony of any person not timely disclosed in writing to the other party shall be stricken and disregarded including the testimony of Mr. Woodruff and Mr. Sharp. CX 121 – 123; Scheduling Order; Commission Rule § 502.207(b). Mr. Hogan and Ms. Yeoman were timely disclosed by Complainants, CX 109 – 110, and timely deposed by Respondents. RX 9 and 605. Mr. Hogan's and Ms. Yeoman's first-hand testimony is admitted. Commission Rule § 502.156. On remand, the ALJ shall strike any self-serving litigation-related expressions of prior subjective intent or understanding and parol evidence by certain witnesses as not "relevant, material, reliable and probative" as required by Commission Rule § 502.156 including statements by Mr. Wrede and Mr. Hawkins because such statements are not considered probative of parties' reasonable expectations at the time when the party entered into the written agreements or made written statements. THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is vacated and this matter is remanded for further proceedings consistent with this mandate and these instructions.

Complainants aspire to address any other questions or concerns at, and appreciate the opportunity participate in, oral argument on this matter.

DATED this 17th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this pleading upon Thomas F. Klinkner, Birch Horton Bittner & Cherot, 1127 West 7th Avenue Anchorage, Alaska 99501 by sending a copy by U.S. Mail and by e-mail attachment to tklinkner@bhb.com and also a copy by e-mail attachment to Holly C. Wells at hwells@bhb.com.

Dated this 17th day of February, 2014.

Steven J. Shamburek
Steven J. Shamburek